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No. 194

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

PAUL F. MYERS, ET AL.,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

CHARLES H. SMITH,
103 West Second St., Waverly, Ohio,
Attorney for Petitioners.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

INDEX

Opinions below 2
Jurisdiction 2
Questions presented 2
Statute and regulation involved 3
Statement of facts 4
Reasons for granting the writ 6
Argument 7
Conclusion 13

List of Authorities

Arrowsmith v. Commissioner, 344 U. S., 6 12
Boatman v. Commissioner, 32 T. C., 1188 .....8, 11
Commissioner v. Segall, 144 F. 2d, 706 10
Commissioner v. Union Pacific R. Co., 86 F. 2d, 637... 10
Trust Co. v. Bouse, 163 Ohio St., 392, 172 N. E., 2d, 7.. 9

Text Book Writers and Tax Services

Alexander Federal Tax Handbook 12
Commerce Clearing House, Standard Federal Tax Reports 12
Monatt's Tax Atlas 12
Prentice-Hall, Federal Tax Guide 12
Rabkin & Johnson, Federal Income, Gift and Estate Taxation 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

PAUL F. MYERS, ET AL.,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To: The Honorable Earl Warren, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The undersigned, on behalf of the petitioners herein, prays that a writ of certiorari issue to review the final order and judgment of the United States Court of Appeals for the Sixth Circuit, entered in cases numbered, 14,276, Paul F. Myers and Dora Jane Myers v. Commissioner of Internal Revenue, and 14,277, Estate of Charles W. Myers, Deceased, Paul F. Myers, Administrator, and Blanche C. Myers, v. Commissioner of Internal Revenue, which had been consolidated therein for their review by the stipulation of the attorneys for the parties.

OPINIONS BELOW

The opinion of Judge Norman O. Tietjens of the Tax Court of the United States, (T. C. Memo. 1959-231, December 11, 1959), is in the appendix hereto, pages 15 to 19.

The Order of the Court of Appeals dated February 22, 1961, is reported in 287 F. 2nd, p. 400, and is in the appendix hereto, page 14 .

JURISDICTION

Petitioners seek to have reviewed the order of the United States Court of Appeals for the Sixth Circuit, dated and filed on February 22, 1961, which affirmed the determination of the Tax Court of the United States in these cases by Memorandum Opinion (T. C. Memo. 1959-231) dated December 11, 1959.

Upon application therefor, an order was entered herein by Mr. Justice Potter Stewart on May 22, 1961, extending the time for filing petition for writ of certiorari to, and including July 3, 1961.

The jurisdiction of this Court is invoked under 28 U. S. Code 1264 (1).

QUESTIONS PRESENTED

1. As stated in the memorandum opinion of the Tax Court, the parties agreed upon all facts leaving only a question of law for decision in these cases, namely, whether the gain realized by petitioners upon repossession of real estate in 1954 under an executory sale contract is taxable as ordinary income or long term capital gain.

The decision of the Tax Court on this question, against the petitioners, held, in effect, that there was no sale, thus making it necessary to consider in the Court of Appeals the further question of law and fact, namely,

2. Did the dealings between the petitioners (vendors) and the purchaser, whereby the petitioners, while retaining title until the purchase price was fully paid, surrendered possession of the real estate at the time the purchaser made the down payment and assumed the other responsibilities of ownership, such as liability for interest on the unpaid purchase money, taxes, insurance and repairs, amount to a sale for federal income tax purposes.

STATUTE AND REGULATION INVOLVED

Reference has been made in the argument to the definition in Subsection (a) (4) of Sec. 117 of the Internal Revenue Code of 1939, as amended, (26 U. S. Code, 1952 ed., Sec. 117) which defines long term capital gain to "mean gain from the sale or exchange of a capital asset held for more than 6 months, if and to the extent such gain is taken into account in computing gross income."

Reference is also made herein to Sec. 39.44-4(b) of Regutions 118, formulated to implement Sec. 44 I. R. C., 1939 (26 U. S. Code, 1952 ed., Sec. 44) which provides a formula for computing gain or loss upon repossession in a deferred payment sale of real property not on installment plan, the pertinent part of which Section is as follows:

> If the vendor has retained title to the property and the purchaser defaults in any of his payments, and the vendor repossesses the property, the difference between (1) the entire amount of the payments actually received on the contract and retained by the vendor plus the fair market value at the time of repossession of fixed improvements placed on the property by the purchaser and (2) the sum of the profits previously returned as income in connection therewith and an amount representing what would have been a proper adjustment for exhaustion, wear and tear, obsolescence, amortization, and depletion of the property during the period the property was in the hands of the purchaser had the sale not been made,

will constitute gain or loss, as the case may be, to the vendor for the year in which the property is repossessed." * * *

STATEMENT OF FACTS

The facts in petitioners cases arise from admissions in the pleadings, facts agreed upon in the stipulation, and facts found in the memorandum opinion of the Tax Court. They may be summarized as follows:

Charles W. Myers and Paul F. Myers, who were father and son, owned four tracts of land as tenants in common in Waverly, Ohio. The premises were improved prior to January 1, 1952, by a cinder block building, in which their garage business was operated.

Title to an adjacent tract of land was held by Paul F. Myers and his wife, Dora Jane Myers, as tenants in common.

The five tracts of land cost a total of $8,000 in 1949 and the improvements consisting of the cinder block building cost $6,000. In October of 1952 the property together with the improvements had an adjusted basis of $12,895, representing the original cost of $14,000 less depreciation allowed by the commissioner of $1,105.

On October 29, 1952, Charles, Paul and Dora Jane Myers by written land contract agreed to sell the above depreciable improved real estate to F. R. L. Realty Corporation for $50,000.00, $5,000 down and the balance of the purchase money to be paid in semi-annual installments of $1,250 each, with interest at 5%. The purchaser assumed the payment of taxes, insurance, and the cost of upkeep of the property. The possession of the property was surrendered to the purchaser upon execution of the contract. No provisions were contained in the contract for contingencies in case of default.

The following payments were made by the F. R. L. Realty Corporation under the contract:

Date	Payments	Interest
October 1952—down payment	$5,000.00	
April 1953	1,250.00	$1,124.00
October 1953	1,250.00	1,092.74
April 1954	1,250.00	1,060.20
Total	$8,750.00	$3,276.94

In October of 1954 the F. R. L. Realty Corporation defaulted in its payment. Charles, Paul and Dora Myers agreed to take back their property and terminate the contract. The F. R. L. Realty Corporation surrendered the premises and the Myerses repossessed the property in December of 1954. During the period when the realty corporation was in possession, the property depreciated to the extent of $780 and no improvements were made to the property.

The Commissioner in 1957 and 1958 made deficiency assessments against petitioners claiming that they realized long term capital gain in 1952 from the deferred payment sale of capital assets that year and that payments on the principal in 1953 and 1954 were taxable in those years as ordinary income, and that the gain on repossession in 1954 was taxable as ordinary income. Petitioners filed four cases in the Tax Court to redetermine the tax deficiencies. During the pendency of the proceedings in the Tax Court, the Commissioner conceded that the payments of purchase money in 1952, 1953 and 1954 were not taxable as the petitioners had not recovered their basis in the property. Petitioners' two cases involving gain on the repossession were appealed to the United States Court of Appeals for the Sixth Circuit following the decision

of Judge Tietjens of the Tax Court that the gain on repossession was taxable as ordinary income. The Court of Appeals affirmed the decision of the Tax Court.

REASONS FOR THE ALLOWANCE OF THE WRIT

1. The decision herein of the United States Court of Appeals for the Sixth Circuit affirming the decision of the Tax Court of the United States, on the principal question in our case, namely whether petitioners' gain or repossession is long term capital gain or ordinary income, is in conflict with the decision of this Court in the case of *Arrowsmith v. Commissioner*, 344 U. S., 6, which holds that there is a relation back to the nature of the assets involved in a transaction of an earlier year to determine the character of gain or loss, whether capital or not, when income received in a later tax year flows from the original transaction. The petitioners contend that the gain on repossession in 1954 is the wind-up of a sale of capital assets entered into in 1952, and is therefore entitled to long term capital gain treatment.

2. The decision herein as to the secondary question, whether or not a sale was effected between petitioners and the purchaser under the land contract, is at variance with the language in the decision of the Court of Appeals for the Sixth Circuit in the case, *In re Segall*, 114 F., 2d, 706, and conflicts with the decision in the case of *Commissioner of Internal Revenue v. Union Pacific R. Co.*, 86 F. 2d, 637, (2d Circuit) and the case of *Trust Co. v. Bouse*, 163 Ohio St., 392, 127 N. E., 2d, a leading case which states the substantive law of the State of Ohio defining the property rights of the parties to such a land contract.

ARGUMENT

The land contract entered into in 1952 between the taxpayers and the F. R. L. Realty Corporation, is a well known commercial transaction in common use in most of the states. It is used in Ohio and other states in the midwest extensively where real estate is sold for a small down payment. Title is retained by the vendor under such contracts until full payment of the purchase money is made, or in many cases, until a substantial part of the purchase price is paid when title is then transferred to the purchaser and a real estate mortgage taken back for the balance due.

When the parties enter into such a contract, two things can happen. Either the purchase price is paid and the contract is completed by transfer of title, or there is a default and the vendor repossesses the real property which was the subject of the contract.

The tax laws make provisions for either contingency. Unless the down payment of purchase money exceeded, or was equal to the vendor's adjusted basis in the property, no taxable gain results. When the payments equal the basis, then there is taxable income. The gain when received would be captial gain or ordinary income depending whether the assets sold were capital assets or non-capital assets.

If the purchaser defaulted, Sec. 39.44-4b provided for gain on the repossession. The purchase money retained by the vendor plus the value of improvements erected by the purchaser, less the amount of payments reported for taxation and an amount allowable for depreciation while the premises were in possession of the purchaser, represent the taxable gain on the repossession.

We look upon the tax on such a deferred payment sale as a "delayed action" tax. The outcome must be awaited to see if there is gain on the sale or gain on repossession.

Whether the purchaser completed his contract or defaulted in the performance of it, the character of the real estate as capital assets or non-capital assets would not be changed. We submit that if there had been gain in the payments of purchase money received in this case, it would have been taxed under Sec. 117 of the Internal Revenue Code of 1939, (26 U. S. Code 1952 ed. Sec. 117) above referred to, as long term capital gain since the depreciable real estate sold was capital assets and had been owned by the taxpayers for more than six months. Like treatment should be accorded the same proceeds if the purchaser fell into default and the purchase money payments were taxed as gain on repossession under the formula in Sec. 39.44-4b of Regulations 118.

Under Sec. 117 (a) (4) of the Internal Revenue Code of 1939, as amended (26 U. S. Code, 1952 ed., Sec. 117), long term capital gain results from the sale or exchange of depreciable real estate (capital assets), if the asset had been held for more than six months. This law was reenacted in 1954, (Sec. 1222 of the Internal Revenue Code of 1954, 26 U. S. Code, 1958 ed., Sec. 1222) and is a part of today's tax laws.

The injudicious value given to the case of *Ralph A. Boatman*, 32 T. C., 1188, as a precedent in the memorandum opinion (T. C. Memo. 1959-231) of the Tax Court deciding these cases, denies to petitioners the favorable treatment of the gain on repossession which they claim relates back to a sale of capital assets—the land-contract transaction in which they had surrendered possession, and other attributes of ownership to the purchaser, of certain de-

preciable real estate held for more than six months before the land contract was executed. An examination of the *Boatman* case discloses that it can be distinguished on the facts. The transaction there between the seller and buyer was but a contract to sell in the future—it was not a closed transaction for tax purposes. The possession of the property to be sold was not surrendered to the purchaser and the purchaser had not been clothed with the other benefits and burdens of ownership.

The Tax Court failed to give consideration to facts in the *Myers* cases which are important taxwise. Possession was given to the purchaser and the purchaser assumed to pay interest on the balance of the purchase price; taxes; insurance; and be responsible for repairs. In executory contract sales, the passage of title is perhaps the most conclusive circumstance in the determination of when a real estate transaction is closed—but not always. Transfer of possession is also significant. Another important factor is whether there has been a substantial performance of conditions such as would impose upon the purchaser an unconditional duty to pay. Usually a sale will be considered complete when the buyer is put in possession and clothed with all the benefits and burdens of ownership, even though delivery of the deed is postponed until the purchase money is fully paid.

The Ohio rule with regard to the relationship existing between the seller and the purchaser under such an executory land-contract is stated in the Supreme Court case of *Trust Co. v. Bouse*, 163 Ohio St., 392 (1955), that because of "the well known fundamental rule in equity, what is agreed to be done is regarded as done, so that from the time a contract is made for the purchase of real estate, the vendor is, in a sense, a trustee for the purchaser, and

the purchaser, in a sense, is the real owner of the land, so that each under the ordinary equitable rules is protected. The whole practice in equity with reference to such contract is clearly on the basis that the parties are under equitable obligations to each other."

The Federal rule follows the Ohio rule. In the case of *Commissioner of Internal Revenue v. Union Pacific R. Co.*, (C. C. 2), 86 F., 2d, 637, we find the following statement of law, "A closed transaction for tax purposes results from a contract of sale which is absolute and unconditional on the part of the seller to deliver to the buyer a deed upon payment of the consideration and by which the purchaser secures immediate possession and exercises all of the rights of ownership. The delivery of a deed may be postponed and payment of a part of the purchase money may be deferred by installment payments; but for taxing purposes, it is enough if the vendor obtains under the contract the unqualified right to recover the consideration."

In the case of *Commissioner of Internal Revenue v. Segall*, 114 F., 2d, 706, *in the Sixth Circuit*, the Court in discussing the case, recognized that there are no hard and fast rules for determining for tax purposes, when a sale was consummated, and no single factor is controlling, but the transaction must be viewed as a whole and in the light of realism and practicality, citing a number of cases where transfer of possession and where the performance of conditions precedent imposed upon the purchaser an unconditional duty to pay, were considered to be factors in determining whether or not a sale was effected.

We therefore submit that as a matter of law, the executory land contract between petitioners and their purchaser effected a sale of depreciable property (capital assets) and that the profits, if any, from such sale are entitled to long term capital gain treatment.

It is felt that both the Tax Court and the Court of Appels were impressed by the facts that the petitioners, upon repossession, recovered the real estate which had been sold and also retained the purchase money which had been paid. The Tax Court opinion says, in paraphrasing the language used in the *Boatmen case*, "(They) merely entered into a sale contract which was never carried out—a transaction which left (them) with the subject of the contract plus ($8750)."

Judge Thornton in the order entered in the Court of Appeals, says: "The determination of the Tax Court that the petitioners realized ordinary income in 1954 when they repossessed real estate (which they had sold in 1952 after owning the same for more than six months) under mutual agreement with the vendee that the sale was not to be carried out, and that they were to retain that part of the purchase price which had already been paid to them, is affirmed * * *."

What may seem to be unjust enrichment is, under the tax laws, only a factor in determining gain on repossession. Unless there is a repossession of the real estate sold and a concurrent retention of the purchase money paid (and not reported as taxable income) there is no taxable gain on repossession. Sec. 39.44-4b of Regulations 118, as we have pointed out above, provides that the difference (1) between the payments *retained* by the vendor plus the fair market value of improvements placed on the property by the purchaser, and (2) the sum of profits previously returned as taxable income plus a reasonable allowance for depreciation (fixed in these cases at $780.00), constitutes gain or loss to the vendor for the year in which the property is repossessed. It does not follow that the gain is ordinary income and the Regulations do not make it so.

We pointed out to the Tax Court that our contention was supported by the following named text book writers, and editorial boards of tax services: Rabkin and Johnson (Sec. 43.12) in their text, Federal Income, Gift and Estate Taxation; Alexander Federal Tax Handbook, 1954, Par. 1313, page 263; Monatt's Tax Atlas, 1956, Par. 15,030; Commerce Clearing House, Standard Federal Tax Reporter, 1954, Vol. 2, Par. 430.63; and, Prentice-Hall, Federal Tax Guide, 1956, at Par. 67.13. This view stems from the *Arrowsmith* case in this Court (*Arrowsmith v. Commissioner*, 344 U. S. 6, 97 L. ed. 6, 73 S. Ct. 713). It was there held that a loss arising in 1944 from a capital transaction in 1940, and which would have been a capital loss if it had materialized then, was entitled to "capital loss" treatment for tax purposes in 1944. Two stockholders liquidated and divided the proceeds of a corporation owned by them, the final distribution being made in 1940. In 1944 a judgment was rendered against the corporation and one of the stockholders, half of which was paid by each stockholder. In his opinion, Mr. Justice Black stated, "The losses here fall squarely within the definition of capital losses." * * * It is not even denied that had this judgment been paid after liquidation, but during the year 1940, the losses would have properly been treated as capital ones. For payment during 1940 would simply have reduced the amount of capital gains taxpayers received during that year.

CONCLUSION

The Court of Appeals in affirming the decision of the Tax Court of the United States did not give consideration and weight to the holding of this Court in the case of *Arrowsmith v. Commissioner*, 344 U. S., 6, which petitioners believe is decisive of the question of law in their cases. Instead, the decision of the Tax Court of the United States was based upon the holding in a Tax Court case, *Boatman v. Commissioner* 32 T. C., 118, in which the Court discovered an illusional similarity between the facts and law there and the facts and law in petitioners' cases.

Therefore, petitioners request that a Writ of Certiorari be granted.

Respectfully submitted,

CHARLES H. SMITH,
Attorney for petitioners.

United States Court of Appeals
For The Sixth Circuit

No. 14276—Paul F. Myers and Dora Jane Myers, Petitioners v. Commissioner of Internal Revenue, Respondent

No. 14277—Estate of Charles W. Myers, Deceased, Paul F. Myers, Administrator, and Blanche C. Myers, Petitioners v. Commissioner of Internal Revenue, Respondent

Order

[Filed February 22, 1961]

Before: Simons, Senior Judge, O'Sullivan, Circuit Judge, and Thornton, District Judge.

The above cause coming on to be heard on the record, the briefs of the parties, and the argument of counsel in open court, and the court being duly advised,

The determination of the Tax Court that the petitioners realized ordinary income in 1954 when they repossessed real estate (which they had sold in 1952 after owning the same for more than six months) under mutual agreement with the vendee that the contract of sale was not to be carried out, and that they were to retain that part of the purchase price which had already been paid them, is affirmed upon the opinion of Judge Norman O. Tietjens of the Tax Court of the United States. (T. C. Memo. 1959-231, December 11, 1959)

Approved for entry:

s Thomas P. Thornton

United States District Judge, (sitting by designation)

(Reported in 287 F. 2d 400)

Memorandum Opinion of the Tax Court

(T. C. Memo. 1959-231) entered December 11, 1959

Tietjens, *Judge*: The Commissioner determined the following deficiencies in income tax and additions to tax:

Docket Number	Petitioners	Years	Income Tax	Additions to Tax I.R.C. of 1939 Sec. 293 (a)	Sec. 294(d) (1)(A)	Sec. 294(d) (2)
66948	Estate of Charles W. Myers, Dec'd, Paul F. Myers, Administrator, and Blanche C. Myers	1952	$402.00	$20.10	$46.62	$31.08
		1953	75.00	3.75	10.91	7.26
66949	Paul F. Myers and Dora Jane Myers	1954	582.26	.....	.....	.....
66955	Paul F. Myers	1952	248.02	12.40	22.07	14.70
		1953	567.87	28.39	.....	.....
				Sec. 6651(a), I.R.C. 1954		
72557	Estate of Charles W. Myers, Dec'd, Paul F. Myers, Administrator, and Blanche C. Myers	1954	$464.00	.....	$46.40	.....

The only question for decision is whether gain realized by petitioners upon the repossession of real estate under an executory sale contract in 1954 is taxable as ordinary income or as capital gain.

The propriety of the additions to tax depends upon whether or not resolution of the principal issue results in deficiencies in income tax.

All of the facts have been stipulated, are so found, and the stipulation of facts in the attached exhibits are included herein by this reference.

Charles W. Myers and Paul F. Myers, who were father and son, owned four tracts of land as tenants in common in Waverly, Ohio. The premises were improved prior to January 1, 1952, by a cinder block building, in which a garage business was operated.

Title to an adjacent tract of land was held by Paul F. Myers and his wife, Dora Jane Myers, as tenants in common.

The five tracts of land cost a total of $8,000 in 1949 and the improvements consisting of the cinder block building cost $6,000. In October of 1952 the property together with the improvements had an adjusted basis of $12,895, representing the original cost of $14,000 less depreciation allowed or allowable of $1,105.

In August of 1952 the United States Atomic Energy Commission announced that a site near Waverly, Ohio, had been selected for the construction of a gaseous diffusion plant. Following the announcement, builders, promoters, speculators and workers came from all parts of the country to build houses, trailer parks, motels, restaurants and establish other businesses to serve the incoming construction workers. The F. R. L. Realty Corporation obtained a lease on a store building adjoining the Myers Garage. The corporation soon became interested in the garage property and a contract was drawn up wherein it offered to pay Charles W. Myers, Paul F. Myers and Dora Jane Myers $50,000 for the property. The contract called for the payment of $5,000 down and $2,500 a year, payable semi-annually, with interest at 6 per cent upon the unpaid balance.

On October 29, 1952, Charles, Paul and Dora Jane Myers by written agreement agreed to sell the above described real estate to F. R. L. Realty Corporation for $50,000. The contract recited that $5,000 had been paid. The balance

was to be paid at the rate of $2,500 per annum, payable semi-annually with 5 per cent interest. No provisions were contained in the contract for contingencies in case of default.

The following payments were made by the F. R. L. Realty Corporation under the contract:

Date	Payments	Interest
October 1952 - down payment	$5,000.00	
April 1953	1,250.00	$1,124.00
October 1953	1,250.00	1,092.74
April 1954	1,250.00	1,060.20
Total	$8,750.00	$3,276.94

In October of 1954 the F. R. L. Realty Corporation defaulted in its payment. Charles, Paul and Dora Myers agreed to take back their property and terminate the contract. The F. R. L. Realty Corporation surrendered the premises and the Myerses repossessed the property in December of 1954. During the period when the realty corporation was in possession, the property depreciated to the extent of $780 and no improvements were made to the property.

Paul Myers did not report any gain or interest income from the foregoing transaction in his returns for the years 1952 and 1953. Charles and Blanche C. Myers did not report any gain or interest from the transaction in their original 1952 return. A gain was reported in their amended return for the year 1952 and delinquent returns for the years 1953 and 1954 which were filed on about May 18, 1955.

The Commissioner determined that petitioners realized long-term capital gains in 1952 from the execution of the contract in that year and that payments on the original principal received in 1953 were taxable in that year as ordinary income. He now concedes these determinations

to be in error. He maintains, however, that petitioners realized gain in 1954 upon repossession of the real estate taxable as ordinary income in the amount of $8,750 less depreciation of $780.

Petitioners contend that their gain is a capital gain. They cite no cases which would sustain their contention and this case is referred to on brief as "a question of first impression."

Since the briefs were filed, however, the case of *Ralph A. Boatman*, 32 T. C. .... (September 14, 1959) has been decided by this Court. There, petitioner was the vendor of a farm under an executory sale contract. The selling price was $60,000, of which $12,000 was paid on execution of the contract, the balance to be paid on subsequent delivery of the deed. The contract was not carried out and the petitioner retained the $12,000. We held this amount to be taxable to petitioner as ordinary income.

We perceive no controlling factual differences between the *Boatman* case and the one before us. There we held that there had been no "sale or exchange," and to paraphrase language used in the Boatman opinion,

> The facts were all stipulated and it is abundantly clear that no sale was ever made by petitioner(s). (They) merely entered into a sale contract which was never carried out—a transaction which left (them) with the subject of the contract plus ($8,750).
>
> * * * The fact remains petitioner(s) never sold or exchanged anything that resulted in (their) receiving the ($8,750).
>
> We hold, therefore, that the amount of ($8,750 less depreciation) was retained by the petitioner(s) when the executory contract for the sale of (the real estate) was not carried out, is taxable to (them) as ordinary income. * * *

On the principal issue we decide in this case on the authority of *Ralph A. Boatman, supra*, that petitioners

realized ordinary income in 1954 when they repossessed the real estate under a mutual agreement with their vendee that the contract of sale was not to be carried out and that they were to retain that part of the purchase price which had already been paid them.

The additions to tax under section 294(d) are not contested in the event a Rule 50 computation results in deficiencies. However, in view of the Supreme Court's decision in *Commissioner v. Acker*, ... U.S. .... (November 16, 1959) and the determination stating that no declarations were filed, the only additions to tax that would be proper are those under section 294(d) (1) (A), Internal Revenue Code of 1939.

Similarly, no issue has been raised with respect to the addition to tax under section 6651(a), Internal Revenue Code of 1954. Accordingly, it is sustained.

Because of concessions and stipulated adjustments,

Decisions will be entered under Rule 50.

SUPREME COURT, U. S.

FILED
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JAMES R. BROWNING, Clerk

No. 194

In the Supreme Court of the United States

OCTOBER TERM, 1961

PAUL F. MYERS, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
JOHN B. JONES, Jr.,
Acting Assistant Attorney General,
A. F. PRESCOTT,
CHARLES B. B. FREEMAN,
Attorneys,
Department of Justice,
Washington 25, D.C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	1
Statutes and regulations involved	2
Statement	2
Argument	3
Conclusion	5
Appendix	7

CITATIONS

Cases:	
Arrowsmith v. *Commissioner*, 344 U.S. 6	4
Boatman v. *Commissioner*, 32 T.C. 1188	4
Burnet v. *Logan*, 283 U.S. 404	4
Butcher v. *Kagey Lumber Co.*, 164 Ohio St. 85, 128 N.E. 2d 54	4
Coggshall v. *Marine Bank Co.*, 63 Ohio St. 88, 57 N.E. 1086	4
Commissioner v. *Glenshaw Glass Co.*, 348 U.S. 426	4
Commissioner v. *Kann's Estate*, 174 F. 2d 357	4
Helvering v. *William Flaccus Oak Leather Co.*, 313 U.S. 247	4
Johnson v. *Commissioner*, 32 B.T.A. 156	4
Schuster Electric Co. v. *H. C. Stores, Inc.*, 61 Ohio App. 331, 22 N.E. 2d 582	4
Statutes:	
Internal Revenue Code of 1954:	
Sec. 61 (26 U.S.C. 1958 ed., Sec. 61)	2, 7
Sec. 1001 (26 U.S.C. 1958 ed., Sec. 1001)	2, 7
Sec. 1002 (26 U.S.C. 1958 ed., Sec. 1002)	2, 7
Sec. 1222 (26 U.S.C. 1958 ed., Sec. 1222)	2, 4, 8

Miscellaneous:

Treasury Regulations on Accounting Periods and Methods of Accounting (1954 Code):

	Page
Sec. 1.453–4(a)(1)	2, 5, 8
Sec. 1.453–4(a)(2)	5, 8
Sec. 1.453–4(b)(2)	5, 8
Sec. 1.453–5	2, 9, 11
Sec. 1.453–6(b)	2, 5

Treasury Regulations 118 (1939 Code):

Sec. 39.44–2(a)(1)	5
Sec. 39.44–2(a)(2)	5
Sec. 39.44–2(b)(2)	5
Sec. 39.44–4(b)	5

In the Supreme Court of the United States

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COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Tax Court (Pet. 15–19) is not officially reported. The order of the court of appeals (Pet. 14) is reported at 287 F. 2d 400.

JURISDICTION

The order of the court of appeals was entered on February 22, 1961 (Pet. 14). The time within which to file a petition for a writ of certiorari was extended to July 3, 1961. The petition was filed on June 30, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court below correctly held that the gain realized by petitioners upon a repossession of real

estate under an executory contract for sale is taxable as ordinary income.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutory provisions, Sections 61(a), 1001(c), 1002 and 1222(3), of the Internal Revenue Code of 1954, and the pertinent Treasury Regulations (1954 Code), Sections 1.453–4, 1.453–5 and 1.453–6, appear in the Appendix, *infra*.

STATEMENT

Petitioners in 1952 entered into a contract with F.R.L. Realty Corporation (Realty) for the sale of certain real estate that had been held more than six months, for a consideration of $50,000. The agreement recited that a down payment of $5,000 had already been paid, and the balance was to be payable at the rate of $2,500 per annum, payable semiannually, with interest on the balance. If Realty wished to prepay for a clear title to the property it was to guarantee "earnings" of no less than $10,000. If cash was paid instead of the annual payments, the "total cost" was to be $60,000, at which time Realty was to receive a warranty deed to the property. In addition, Realty agreed, for further security, to build motels on the property costing no less than $30,000, construction to begin within one year from the date of the agreement. Realty also assumed liability for real estate taxes and assessments levied against the property after the date it took possession, as well as for repairs, improvements and insurance (Pet. 16–17, R. 43a, 45a–46a). Realty did not execute a promissory note or any other evidence of

indebtedness other than the contract (R. 40a). The contract contained no provisions for contingencies in case of default (Pet. 17).

After taking possession of the property, with title retained in the petitioners, Realty made payments in 1953 and 1954 that, together with the down payment, totaled $8,750, which was less than petitioners' adjusted cost basis for the property of $12,895 (Pet. 16–17, R. 45a–46a). In 1954 Realty defaulted in its payments. Petitioners agreed to take back the property and terminate the contract. Realty surrendered the premises, and petitioners repossessed the property in December of 1954. During Realty's occupancy no improvements were made to the property (Pet. 17, R. 46a).

The Tax Court held that no sale was ever made by the petitioners; that they merely entered into a contract for sale that was never carried out; and that, to the extent of $8,750 less depreciation, "petitioners realized ordinary income in 1954 when they repossessed the real estate under a mutual agreement with their vendee that the contract of sale was not to be carried out and that they were to retain that part of the purchase price which had already been paid them" (Pet. 18–19). The Court of Appeals affirmed (Pet. 14).

ARGUMENT

The decision below is correct. The admitted gain in 1954 arose not from the contract for sale but from the subsequent agreement under which petitioners regained possession of the property, retained the pay-

ments, and for the first time realized gain.[1] Having been rescinded, the contract for sale was ineffective *ab initio*. *Schuster Electric Co.* v. *H. C. Stores, Inc.*, 61 Ohio App. 331, 335, 22 N.E. 2d 582.[2] Hence, there was no "sale or exchange," which is essential to the applicability of the pertinent capital gains provision of the Internal Revenue Code, Section 1222(3) (Appendix, *infra*); *Helvering* v. *William Flaccus Oak Leather Co.*, 313 U.S. 247. On the contrary, the payments retained amounted in effect to liquidated damages for breach of contract, taxable as ordinary income. *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426; *Johnson* v. *Commissioner*, 32 B.T.A. 156. The only prior decision involving the question here is in accord with the decision below. *Boatman* v. *Commissioner*, 32 T.C. 1188.

There is no merit to petitioners' contention that the decision below conflicts with *Arrowsmith* v. *Commissioner*, 344 U.S. 6. There, the gain from a liquidating dividend when received had been taxed under the capital gains provisions and when, in a later year, it was determined that a portion of the dividend must be returned, it was held that the loss resulting must be treated as a capital loss in the later year. Here, the payments, though they would later have been

[1] As the payments did not exceed petitioners' cost basis, they were not income under any hypothesis when received. *Burnet* v. *Logan*, 283 U.S. 404; *Commissioner* v. *Kann's Estate*, 174 F. 2d 357 (C.A. 3d).

[2] It is to be noted that under state law the 1952 agreement was merely an executory contract for sale, *Coggshall* v. *Marine Bank Co.*, 63 Ohio St. 88, 57 N.E. 1086; *Butcher* v. *Kagey Lumber Co.*, 164 Ohio St. 85, 128 N.E. 2d 54.

considered capital payments had the sale been consummated, did not give rise to any gain when received. It was not until 1954, when the property was repossessed and by mutual agreement petitioners retained the payments, that the payments became income—income that was taxable at ordinary rates.

Petitioners' case is not advanced by their reference to the Treasury Regulations (Pet. 11). The Regulations under the 1954 Code, Section 1.453–6(b) (Appendix, *infra*), which are equivalent to those cited by petitioners,[3] do not apply. They are applicable only to deferred-payment sales under "agreements of purchase and sale" when the title is retained (or to sales in which there is an immediate transfer of title protected by a mortgage or other lien as to deferred payments), Section 1.453–4(a) (1) and (2)[4] (Appendix, *infra*), and then only where the payments received during the taxable year in which the sale is made exceed 30 percent of the selling price, Section 1.453–4(b)(2)[5] (Appendix, *infra*).

CONCLUSION

There is no conflict of decisions, no question of general importance, and no other reason war-

[3] Petitioners cite Section 39.44–4(b) of Regulations 118; however, since the repossession took place in 1954, regulations under the 1954 Code are effective. The latter are substantially the same as those cited by petitioners.

[4] Substantially the same as Section 39.44–2(a) (1) and (2) of Regulations 118.

[5] Substantially the same as Section 39.44–2(b)(2) of Regulations 118.

ranting further review of this case. The petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

JOHN B. JONES, JR.,
Acting Assistant Attorney General.

CHARLES B. E. FREEMAN,
A. F. PRESCOTT,
Attorneys.

SEPTEMBER 1961.

APPENDIX

Internal Revenue Code of 1954:

SEC. 61. GROSS INCOME DEFINED.

(a) *General Definition.*—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

* * * * *

(3) Gains derived from dealings in property;

* * * * *

(26 U.S.C. 1958 ed., Sec. 61.)

SEC. 1001. DETERMINATION OF AMOUNT OF AND RECOGNITION OF GAIN OR LOSS.

* * * * *

(c) *Recognition of Gain or Loss.*—In the case of a sale or exchange of property, the extent to which the gain or loss determined under this section shall be recognized for purposes of this subtitle shall be determined under section 1002.

* * * * *

(26 U.S.C. 1958 ed., Sec. 1001.)

SEC. 1002. RECOGNITION OF GAIN OR LOSS.

Except as otherwise provided in this subtitle, on the sale or exchange of property the entire amount of the gain or loss, determined under section 1001, shall be recognized.

(26 U.S.C. 1958 ed., Sec. 1002.)

SEC. 1222. OTHER TERMS RELATING TO CAPITAL GAINS OR LOSSES.

For purposes of this subtitle—

* * * * *

(3) *Long-term capital gain.*—The term "long-term capital gain" means gain from the sale or exchange of a capital asset held for more than 6 months, if and to the extent such gain is taken into account in computing gross income.

* * * * *

(26 U.S.C. 1958 ed., Sec. 1222.)

Treasury Regulations on Accounting Periods and Methods of Accounting (1954 Code):

* * * * *

SEC. 1.453–4 SALE OF REAL PROPERTY INVOLVING DEFERRED PERIODIC PAYMENTS.—(a) *In general.*—Sales of real property involving deferred payments include (1) agreements of purchase and sale which contemplate that a conveyance is not to be made at the outset, but only after all or a substantial portion of the selling price has been paid, and (2) sales in which there is an immediate transfer of title, the vendor being protected by a mortgage or other lien as to deferred payments.

(b) *Classes of sales.*—Such sales, under either paragraph (a) (1) or (2) of this section, fall into two classes when considered with respect to the terms of sale, as follows:

(1) Sales of real property which may be accounted for on the installment method, that is, sales of real property in which (i) there are no payments during the taxable year of the sale or (ii) the payments in such taxable year (exclusive of evidences of indebtedness

of the purchaser) do not exceed 30 percent of the selling price, or

(2) Deferred-payment sales of real property in which the payments received in cash or property other than evidences of indebtedness of the purchaser during the taxable year in which the sale is made exceed 30 percent of the selling price.

* * * * *

SEC. 1.453–5 SALE OF REAL PROPERTY TREATED ON INSTALLMENT METHOD.—(a) *In general.*—In any transaction described in paragraph (b)(1) of § 1.453–4, that is, sales of real property in which there are no payments during the year of sale or the payments in that year do not exceed 30 percent of the selling price, the vendor may return as income from each such transaction in any taxable year that proportion of the installment payments actually received in that year which the gross profit (as described in paragraph (b) of § 1.453–1) realized or to be realized when the property is paid for bears to the total contract price. In any case, the sale of each lot or parcel of a subdivided tract must be treated as a separate transaction and gain or loss computed accordingly. (See paragraph (a) of § 1.61–6.)

(b) *Defaults and repossessions.*—If the purchaser of real property on the installment plan defaults in any of his payments, and the vendor returning income on the installment method reacquires the property sold, whether title thereto had been retained by the vendor or transferred to the purchaser, gain or loss for the year in which the reacquisition occurs is

to be computed upon any installment obligations of the purchaser which are satisfied or discharged upon the reacquisition or are applied by the vendor to the purchase or bid price of the property. Such gain or loss is to be measured by the difference between the fair market value at the date of reacquisition of the property reacquired (including the fair market value of any fixed improvements placed on the property by the purchaser) and the basis in the hands of the vendor of the obligations of the purchaser which are so satisfied, discharged, or applied, with proper adjustment for any other amounts realized or costs incurred in connection with the reacquisition. The basis in the hands of the vendor of the obligations of the purchaser satisfied, discharged, or applied upon the reacquisition of the property will be the excess of the face value of such obligations over an amount equal to the income which would be returnable were the obligations paid in full. For definition of the basis of an installment obligation, see section 453(d)(2) and paragraph (b)(2) of § 1.453–9. No deduction for a bad debt shall in any case be taken on account of any portion of the obligations of the purchaser which are treated by the vendor as not having been satisfied, discharged, or applied upon the reacquisition of the property, unless it is clearly shown that after the property was reacquired the purchaser remained liable for such portion; and in no event shall the amount of the deduction exceed the basis in the hands of the vendor of the portion of the obligations with respect to which the purchaser remained liable after the

reacquisition. (See section 166 and the regulations thereunder.) If the property reacquired is bid in by the vendor at a foreclosure sale, the fair market value of the property shall be presumed to be the purchase or bid price thereof in the absence of clear and convincing proof to the contrary. If the property reacquired is subsequently sold, the basis for determining gain or loss is the fair market value of the property at the date of reacquisition (including the fair market value of any fixed improvements placed on the property by the purchaser).

SEC. 1.453–6 DEFERRED-PAYMENT SALE OF REAL PROPERTY NOT ON INSTALLMENT METHOD.—(a) *Value of obligations.*—(1) In transactions included in paragraph (b)(2) of § 1.453–4, that is, sales of real property involving deferred payments in which the payments received during the year of sale exceed 30 percent of the selling price, the obligations of the purchaser received by the vendor are to be considered as an amount realized to the extent of their fair market value in ascertaining the profit or loss from the transaction. Such obligations, however, are not considered in determining whether the payments during the year of sale exceed 30 percent of the selling price.

(2) If the obligations received by the vendor have no fair market value, the payments in cash or other property having a fair market value shall be applied against and reduce the basis of the property sold and, if in excess of such basis, shall be taxable to the extent of the excess. Gain or loss is realized when the obli-

gations are disposed of or satisfied, the amount thereof being the difference between the reduced basis as provided in the preceding sentence and the amount realized therefor. Only in rare and extraordinary cases does property have no fair market value.

(b) *Title retained by vendor.*—(1) if the vendor in sales referred to in paragraph (a) of this section has retained title to the property and the purchaser defaults in any of his payments, and the vendor repossesses the property, the difference between (i) the entire amount of the payments actually received on the contract and retained by the vendor plus the fair market value at the time of repossession of fixed improvements placed on the property by the purchaser and (ii) the sum of the profits previously returned as income in connection therewith and an amount representing what would have been a proper adjustment for exhaustion, wear and tear, obsolescence, amortization, and depletion of the property during the period the property was in the hands of the purchaser had the sale not been made, will constitute gain or loss, as the case may be, to the vendor for the year in which the property is repossessed.

(2) The basis of the property described in subparagraph (1) of this paragraph in the hands of the vendor will be the original basis at the time of the sale plus the fair market value at the time of repossession of fixed improvements placed on the property by the purchaser, except as provided in subparagraph (3) of this paragraph.

* * * * *

U. S. GOVERNMENT PRINTING OFFICE 1961

No. 194

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

PAUL E. MYERS, ET AL.,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

REPLY BRIEF FOR PETITIONERS

CHARLES H. SMITH,
308 East North St., Waverly, Ohio,
Attorney for Petitioners.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

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FOREWORD

Pursuant to paragraphs 3 and 4 of Rule 40, there being no disagreement between the parties with the presentation of items (a), (b), (c) and (d) in their respective briefs, petitioners will omit the restatement of same in this their reply brief.

The respondent states the question in his Answer Brief in Opposition in language substantially as stated by petitioners. Accordingly, the only difference between the petitioners and the respondent, and the only question which has been presented for decision in this case is, whether the gain assessed by respondent in 1954 against petitioners upon their repossession of capital assets (depreciable real property) sold under an executory contract, in 1952, was ordinary income or long term capital gain, the capital

assets having been owned by petitioners for more than six months before their sale.

Petitioners brought four cases in the Tax Court, two for the redetermination of taxes assessed upon the payments of purchase money received on the land contract in 1952 and 1953, as ordinary income and two for a redetermination of the taxes assessed upon the gain on repossession in 1954, also as ordinary income. In the Tax Court respondent conceded that the payments in 1952, 1953 and 1954 were less than the basis of the petitioners in the real property sold and were not taxable in the years in which the payments were received. The two cases involving the payments of purchase money received by petitioners were not appealed from. In the two cases involving gain on repossession the Tax Court and the United States Court of Appeals for the Sixth Circuit sustained the respondent, holding the gain to be taxable as ordinary income, and our petition for certiorari is directed to the latter two cases.

The gain on repossession was assessed by respondent under the provisions of Section 39.44-4 of Regulations 118, the pertinent portion of which Section is as follows:

> "If the vendor has retained title to the property and the purchaser defaults in any of his payments, and the vendor repossesses the property, the difference between (1) the entire amount of the payments actually received on the contract and retained by the vendor plus the fair market value at the time of repossession of fixed improvements placed on the property by the purchaser and (2) the sum of the profits previously returned as income in connection therewith and an amount representing what would have been a proper adjustment for exhaustion, wear and tear, obsolescence, amortization, and depletion of the property during the period the property was in the hands of the purchaser had the sale not been made will constitute gain or loss, as the case may be, to the vendor for the year in which the property is repossessed."

In the Tax Court and in the Court of Appeals, the respondent took the position that the gain on repossession assessed under the above formula in these cases was not entitled to capital gain treatment for the reason that the transaction between taxpayers and their purchaser was not a sale within the meaning of Sec. 117(a)(4) of the Revenue Code of 1939, (Re-enacted verbatim in the Code of 1954—26 U. S. C. 1958 ed. Sec. 1222. Respondent's App., page 8). Respondent (at footnote 2, page 4 of his brief) now appears to agree with petitioners that the sale was executory—title was retained pending the payment of the deferred semi-annual payments, which is exactly the type of transaction—deferred payment sale where title was retained, described in the above Sec. 39.44-4 of Regulations 118. It would seem that the issue in the case had been resolved, however, the respondent now denies that Section 39.44-4 of Regulations 118 or the new Regulation, Section 1.453-6(b) which was promulgated to implement the 1954 Code, are applicable to determine petitioners' gain and argues that the gain, still taxed as ordinary income, arose from a subsequent agreement under which petitioners regained possession of the property and retained the payments.

ARGUMENT

This case originally involved gain to the petitioners on the repossession of capital assets (depreciable real property) which they sold for $50,000.00 in 1952 by the terms of an executory land contract on deferred payments, whereby title was retained by the petitioners until the purchaser made full payment of the purchase price. During the third tax year (December 1954) the purchaser defaulted and the property was repossessed in depreciated condition and unimproved by the purchasers during the period of their possession.

The purchaser had paid to petitioners during the three years, 1952, 1953 and 1954, the sum of $8,750.00 on the purchase money.

The respondent assessed taxes against petitioners upon gain on this repossession (as appears in his deficiency letter of March 6, 1958—R. 28a) "under Section 453 of the Internal Revenue Code of 1954, computed as follows:

Payment received under contract	$8,750.00
Less: Depreciation on property in hands of purchaser	780.00
Total profit on repossession	$7,970.00
Distribution: (Ordinary income)	
Paul F. and Dora Jane Myers	$3,985.00
Estate of Charles W. Myers, deceased, Paul F. Myers, Administrator, and Blanche C. Myers, surviving wife	$3,985.00"

An examination of the pertinent part of Section 453 of the Internal Revenue Code of 1954, which part is included in the Appendix hereto, page 10, will disclose that no provision is made therein for gain on repossession. The language of Section 44(b) of the Revenue Code of 1939 which relates to installment and deferred payment sales of real

property is very similar to Section 453 of the 1954 Code. It will also be noted that it does not make provision for gain on repossession. (The pertinent part of Section 44(b) is set out in the appendix of this brief at page 9).

Section 44(b) of the 1939 Code was implemented by Section 39.44-4 (referred to in Foreword) of Regulations 118 and therein appears the formula for determining gain or loss in deferred payment sales of real property where title was retained by the vendor, if the purchaser defaults in any of his payments and the vendor repossesses the property.

It thus appears that the respondent in March 1958, applied the formula in Section 39.44-4, above, to assess gain on repossession. Section 1.453 of the Regulations under the 1954 Code had not been promulgated at that time and did not become effective until September 18, 1958, some six months later. But now respondent denies that the Regulations under the 1939 Code or the 1954 Code apply to petitioners' case.

Petitioners are at a loss to understand the change in position of the respondent who now states, in his Brief of Opposition, (footnote 3, page 5), that the provisions of Section 39.44-4 of Regulations 118, relative to gain on repossessions are not applicable to petitioners' case, "since the repossession took place in 1954, regulations under the 1954 Code are effective."

In the text of his argument on page 5, respondent also states that "the Regulations under the 1954 Code, Section 1.453.6 which are equivalent to those cited by petitioners, do not apply. They are applicable only to deferred payments sales * * * when the title is retained * * * and then only where the payments received during the taxable year

in which the sale is made exceed 30 percent of the selling price." (The down payment in 1952 in petitioners' land contract was but $5,000.00 or 10 per cent of the selling price.

Thus, according to respondent at this time, there was no regulation in effect in December 1954 which authorized him to compute gain on such a repossession.

Our view, however, is to the contrary. The contents of Section 44 of the 1939 Code and Section 453 of the 1954 Code are similar in most respects as to the matters with which we are concerned. T. D. 6091, C. B. 1954-2, 47, made all existing regulations under prior law which are not inconsistent with the Internal Revenue Code of 1954, effective until superseded by new regulations. Moreover Section 1.453 of the Regulations is not interpretative, but is of a legislative nature, making a change in the law it implements and a change in an existing regulation, and would therefore seem not entitled to be given retroactive effect.[1] Accordingly, Sec. 39.44-4 of Regulations 118 would be effective until September 18, 1958, when Sections 1.453-1 to 1.453.10 of regulations to implement Section 453 of the 1954 Code were promulgated in T. D. 6314, dated September 17, 1958, and published in the issue of the Federal Register for September 18, 1958, 23 F. R. 7210.

If, however, the Court should hold with the respondent on this point—that there was no effective regulation under which gain or loss on repossession could be computed in December 1954,—then we submit that the question in the

[1] Section 39.44-4 of the Regulations 118 relates to deferred payment sales where the payments in the year of sale are less than 30 percent. Section 453 of the 1954 Code also relates to deferred payment sales where the payments in the taxable year of sale do not exceed 30 percent, while Regulation 1,453-6 implementing Sec. 453, relates only to sales of real property in which the payments received during the year of sale exceed 30 percent of the selling price.

case, namely, whether the gain on repossession is ordinary income or long term capital gain, becomes moot. Under the respondent's present hypothesis of this case, he was without authority to assess gain on repossession and tax it as ordinary income under Section 453 of the 1954 Code. We know of no tax law or other regulation which provides that the recapture of possession of one's own property depreciated and unimproved, results in taxable income.

To maintain consistency and support the decisions of the Tax Court and the Court of Appeals, which he states are correct, respondent resorts to a fiction to attempt to make the purchase money received in 1952, 1953 and 1954 taxable in 1954. The respondent says that the contract was rescinded and the contract of sale was rendered ineffective from the beginning. Presumably the parties would thereupon be entitled to be placed in the same position they were had the contract not been made. This would mean paying back all the purchase payments and also the interest payments which have been taxed as ordinary income in the years received agreeable to respondent and without objection by the petitioners. Since the contract was terminated in 1954, the respondent must reason that the failure of petitioners to repay these sums and the retention thereof would constitute income to them in that year. The fallacy in such reasoning is, that the payments are not new money. He is still dealing with the purchase money payments which the Tax Court has said were not taxable income. The Tax Court did not say, and neither did the Commissioner when he assessed these payments in the years received, that they were to be held in abeyance to see what happened to the land contract and then ring them up in the cash register and return them as income, if appropriate.

CONCLUSION

Petitioners find themselves in an anomalous position trying to maintain the applicability of a regulation which the respondent disavows. If the regulation is applicable, then we submit that the gain from repossession as assessed thereunder is taxable as long term capital gain for the reasons given in our opening brief. It is a portion of the proceeds from the sale of capital assets. If the regulation in question is not applicable, the question in the cases is moot, as we stated earlier in this brief. The respondent was without authority to assess gain on repossession. Hence his assessment was void and there is no tax due from petitioners by reason of such assessment.

Petitioners having fully replied to the arguments of respondent, renew their request that their petition for a writ of certiorari be granted.

Respectfully submitted,

CHARLES H. SMITH,
208 East North St., Waverly, Ohio,
Attorney for Petitioners.

APPENDIX

Excerpt from Section 44 of the Internal Revenue Code of 1939:

SEC. 44. INSTALLMENT BASIS.

(a) Dealers in Personal Property.—Under regulations prescribed by the Commissioner with the approval of the Secretary, a person who regularly sells or otherwise disposes of personal property on the installment plan may return as income therefrom in any taxable year that proportion of the installment payments actually received in that year which the gross profit realized or to be realized when payment is completed bears to the total contract price.

(b) Sales of Realty and Casual Sales of Personalty.—In the case (1) of a casual sale or other casual disposition of personal property (other than property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year), for a price exceeding $1,000.00 or (2) of a sale or other disposition of real property, if in either case the initial payments do not exceed 30 per centum of the selling price (or in the case the sale or other disposition was in a taxable year beginning prior to January 1, 1934, the percentage of the selling price prescribed in the law applicable to such year), the income may under regulations prescribed by the Commissioner with the approval of the Secretary, be returned on the basis and in the manner above prescribed in this section. As used in this section the term "initial payments" means the payments received in cash or property other than evidences of indebtedness of the purchaser during the taxable period in which the sale or other disposition is made.

Excerpt from Section 453 of the Internal Revenue Code of 1954.

SEC. 453. INSTALLMENT METHOD

(a) Dealers in Personal Property.—Under regulations prescribed by the Secretary or his delegate, a person who regularly sells or otherwise disposes of personal property on the installment plan may return as income therefrom in any taxable year that proportion of the installment payments actually received in that year which the gross profit, realized or to be realized when payment is completed, bears to the total contract price.

(b) Sales of Realty and Casual Sales of Personalty.—

(1) General Rule.—Income from—

(A) a sale or other disposition of real property, or

(B) a casual sale or other casual disposition of personal property (other than property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year) for a price exceeding $1,000. may (under regulations prescribed by the Secretary or his delegate) be returned on the basis and in the manner prescribed in subsection (a).

(2) Limitation.—Paragraph (1) shall apply—

(A) In the case of a sale or other disposition during a taxable year beginning after December 31, 1953 (whether or not such taxable year ends after the date of enactment of this title), only if in the taxable year of the sale or other disposition—

(i) there are no payments, or

(ii) the payments (exclusive of evidences of indebtedness of the purchaser) do not exceed 30 percent of the selling price.

(B) In the case of a sale or other disposition during a taxable year beginning before January 1, 1954, only if the income was (by reason of section 44 (b) of the Internal Revenue Code of 1939) returnable on the basis and in the manner prescribed in section 44 (a) of such code. * * *